IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 14137 of 2004
with
Civil Application No. 9953 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.R. SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CORONOATION AGRO INDU.LTD.

Versus

UNION OF INDIA MINISTRY OF CONSUMER AFFAIRS

Appearance:
1. Special Civil Application No. 14137 of 2004
M/S THAKKAR ASSOC. for Petitioner No. 1
NOTICE SERVED BY DS for Respondent No. 1-2,5
DR SONIA HURRA for Respondent No. 3-4

CORAM : HON'BLE MR.JUSTICE M.R. SHAH

Date of decision:6/01/2005

CAV JUDGEMENT

In this petition under Article 226 of the Constitution of India the petitioner has prayed for an appropriate writ, direction or order declaring that export of wheat product by the petitioner to foreign wheat buyer other than one mentioned in the original

contract is not contrary to the policy decision dated 14.12.2001 taken by the respondent No.1 Food Corporation of India. It is also further prayed for an appropriate writ, direction or order directing the respondent Food Corporation of India [hereinafter referred to as "FCI"] to accept documents of export submitted by the petitioner and release the Bank Guarantee No. BOM0671/BG 86/03-04 dated 16.12.2003.

2. Food Corporation of India is a body formed under the Food Corporation of India Act, and the FCI is required to follow the policy of the Government of India in respect of export of wheat/rice and wheat for wheat products. The Government of India, Ministry of CAF & PD, Department of Food and Public Distribution issued instructions for export of wheat for wheat products wherein the Government of India permitted FCI to offer wheat from the Central Pool to Roller Flour Mills for the purpose of export of wheat products. It appears that the Government of India identified 20 Metric Tonnes of wheat to be made available by FCI during financial year 2001-2002. Decisions were conveyed in respect of the price, the rate at which post-delivery expenses will be reimbursed to the exporters which would cover expenses of shipment such as handling, clearing surveyors inspection, fumigation insurance to the vessel and in addition to the above inland transport expenses were also to be reimbursed giving zone-wise reimbursement of transport expenses and effective issue-price for the purpose of export of wheat for wheat products was worked out. It also appears that the quantity of wheat products exported was also decided and it was kept as not less than 65% of the quantity lifted from the respondent Corporation godowns and the FCI was directed to notify the decision for information of all the concerned experts of wheat products. It appears that the aforesaid instructions were again reiterated by FCI vide their letter dated 20th December 2001 wherein it was clearly mentoned that exporters shall be charged OMSS (Domestic) of the FCI applicable to zone where the delivery is made. It was also decided that the exporter will furnish Bank Guarantee for an amount equal to the sum of post-delivery expenses of Rs. 1750 per M.T. and the applicable inland expenses shown in the column thereupon FCI was required to issue a cheque to the exporters for an equivalent amount. As per the aforesaid guidelines and the policy, exporters were given 90 days time from the date of delivery from the FCI godown for actual shipment out of the country. As per the policy and the guidelines, on furnishing the required export documents by the exporters to the satisfaction of FCI within the period, the Bank

Guarantee was required to be returned and in case of non-submission of required documents, the FCI is/was entitled to encash the Bank guarantee.

2.1. By communication dated 15.12.2003 the petitioner requested the Senior Regional Manager, FCI, Ahmedabad to release 1523 MTs. of wheat for export of 990 MTs of wheat flour (65% of total quantity) and the petitioner also furnished Bank Guarantee for Rs. 22,31,195 which was towards the post-delivery expenses and inland transport expenses. The petitioner declared that the wheat for wheat products would be exported to one P.T. Svee International of Sunter Jakarta, Indonesia, who was the "foreign buyer". The petitioner also furnished necessary sale document dated 12.12.2003, i.e., confirmation of the contract between the suppliers and buyers and the suppliers,i.e. the petitioner and the aforesaid M/s. P.T. Svee International Apt Metro Sunter Unit, Jakarta, Indonesia.

3. It is the case of the petitioner that the petitioner was to export 990 MTs of wheat products to the aforesaid "foreign buyer", i.e. M/s. P.T. Svee International. However, the importer to whom the wheat product was to be exported did not send advance payment before the due date, i.e. 5th January 2004 and therefore it was decided by the petitioner not to export the wheat product to the said foreign buyer and instead decided to export the wheat product to one Agri Commodities and Finance, FZE with whom the petitioner entered into another contract. It is also further the case of the petitioner that the petitioner informed the respondent No.3, i.e. Senior Regional Manager, FCI, Ahmedabad with regard to change of buyer vide communication dated 3.2.2004 along with the copy of the another "foreign buyer" contract. It is the case of the petitioner that thereafter vide communication dated 25.2.2004 the petitioner requested for extension of time to complete the export in view of change in "foreign buyer" and the "foreign buyer contract". It was also pointed out that there is some delay in export of wheat product in view of acute shortage of empty containers to be obtained from shipping lines due to heavy congestion and therefore the petitioner requested for extension of one month for completing the exports. It is the case of the petitioner that vide communication dated 23rd March, 2004 the respondent No.4, Deputy Manager (Commercial), FCI, Ahmedabad, informed the petitioner that the request of the petitioner has been accepted by the competent authority and the petitioner was requested to submit export documents on or before 30th April 2004. It is the

case of the petitioner that while extending time limit to submit export documents the FCI has accepted the request of change of buyer. It is the case of the petitioner that by communication dated 16.4.2004 the petitioner has informed the Regional Manager, FCI, Ahmedabad, with regard to export of 220 MTs. of wheat flour and the said authority was informed that the petitioner will be submitting the export documents by next week and the petitioner requested for grant of extension of time for the balance quantity of 1184.540 MTs. of wheat till 15.6.2004. It is also the case of the petitioner that vide communication dated 7.5.2004 time was extended for a further period upto 15.6.2004 and the petitioner was required to submit export documents upto 15.6.2004. It is the case of the petitioner that thereafter the petitioner has exported the balance quantity of wheat products to foreign countries and had submitted export documents before 15.6.2004. It is the case of the petitioner that though the entire quantity of wheat product which was required to be exported as per the policy of the Government of India has actually been exported within the time permitted by the respondent Corporation and though the petitioner has submitted all the requisite export documents to the respondent Corporation with a request to release the Bank guarantee lying with the Corporation, instead of returning the Bank guarantee to the petitioner, vide communication dated 23rd June 2004 the District Manager, FCI, Rajkot has informed the petitioner that the petitioner has not submitted Certificate of Export and bank payment certificate; shipping bills not signed by customs authorities; name of vessel and reference of Bill of Lading is not shown in one particular invoice; and name of buyer differs from the name of buyer mentioned in the original-contract. It is the case of the petitioner that the District Manager, Rajkot, vide communication dated 23rd June 2004 addressed to respondent No.3, i.e., Senior Regional Manager, FCI, Ahmedabad, also referred the letter dated 11.2.2004 purportedly issued by him by which respondent No.3 allegedly contemplated allowing of foreign buyer contract in place of earlier contract submitted with first allotment. It is the case of the petitioner that though the petitioner has informed the respondents with regard to permitting the petitioner to change the buyer and submitted all the necessary documents, the Bank guarantee is not returned and instead vide communication dated 24.8.2004 the office of respondent No.3 informed the petitioner that change of foreign buyer is not allowed in case of export of wheat products and therefore the petitioner was directed to pay the differential cost for the stocks, failing which the

Bank guarantee would be encashed. It is also the case of the petitioner that the respondent No.3 Senior Regional Manager, FCI, Ahmedabad, vide communication dated 26.8.2004 had requested the Headquarter of FCI for suitable advise/guidance in the matter and it is the case of the petitioner that the matter was under consideration even upto filing of the petition with the office of respondent No.2 FCI, New Delhi and no decision on the letter dated 26.8.2004 is taken by the FCI, New Delhi and without waiting for the decision on the letter dated 26.8.2004 the respondent No.4 Deputy Manager (Commercial), FCI, Ahmedabad, vide communication dated 6.10.2004 has threatened the petitioner that if the petitioner does not pay the differential cost of the stocks which are not exproted in accordance with the original contract at once, the respondent Corporation will encash the Bank guarantee and hence the pettioner has preferred the present Special Civil Application under Article 226 of the Constitution for the aforesaid prayers and reliefs.

4. Shri Navin Pahwa, learned advocate appearing on behalf of the petitioner has vehemently submitted that the petitioner has already exported the entire quantity of wheat product which was required to be exported as per the policy of the Government of India within the time permitted by the respondent Corporation. He has also further submitted that the petitioner has also submitted all the requisite export documents with the respondent Corporation. It is further submitted by him that vide communication dated 3.2.2004 the respondent No.3 was already informed with regard to change of "foreign buyer" due to non-receipt of advance payment by the foreign buyer as per the original contract. He has also further submitted that thereafter after the aforesaid communication dated 3.2.2004 vide communication dated 25.2.2004 the petitioner requested for extension of time to complete export in view of change in "foreign buyer and the foreign buyer contract" and also for some other reason i.e., acute shortage of empty containers to be obtained etc., which was subsequently granted and therefore the respondents have already allowed the petitioner to change the "foreign buyer". Under the circumstances, it is submitted that it is not open for the respondents now not to return the Bank Guarantee and insistence on the part of the respondents to encash the Bank guarantee is most illegal and arbitrary. Relying upon permission for change of buyer in the case of M/s. Bishan Swaroop Ramkishan Agro Pvt. Ltd.,Delhi from Western Region, and communication dated 5.9.2003, Shri Pahwa has submitted that it is the policy of the Union of

India and the FCI to permit change of buyer and on that ground also he has requested to allow the present Special Civil Application. Relying upon one representation by the Roller Flour Millers Federation of India, New Delhi, represented to the Government of India, Department of Food and Public Distribution for issuing suitable directions to the Corporation permitting change in buyer's name even in the case of wheat product export, he has submitted that as the said representation is pending consideration with the Department of Food and Public Distribution the respondent No.4 cannot pressurise the petitioner for encashment of the Bank guarantee.

5. In response to the notice issued by this Court, Ms. Sonia Hurrah, ld. advocate appears on behalf of respondents No. 2 to 5, FCI. Shri Malkan, learned Central Government Standing Counsel appears on behalf of respondent No.1. In view of the interim order dated 27.10.2004,Civil Application No. 9953 of 2004 is also filed by the FCI for vacating the ad-interim relief. Ms. Sonia Hurrah, ld. advocate appearing on behalf of the respondent FCI has submitted that the petitioner has mislead this Court by stating and submitting the communication at Page 56 is the policy of the Government of India and/or FCI. It is submitted that the policy at Page 56 of the compilation is not the policy but it is granting a permission in individual case on the peculiar facts and circumstances and as a special case and it is not the policy either of Government of India and/or the FCI with regard to change of "foreign buyer". Therefore it was requested to vacate the ad-interim relief granted earlier by which the respondents are restrained from encashing the Bank guarantee.

6. An affidavit-in-reply is also filed on behalf of the respondent FCI. It is submitted that the FCI is required to follow the policy of the Government of India in respect of the export of wheat/rice and wheat for wheat products. It is further submitted that as per the policy of the Government of India the change of foreign buyer is not permissible so far as export of wheat for wheat products is concerned. It is also further submitted that when the petitioner requested for release of 1523 MTs. of wheat for export of 990 MTs. of wheat flour, the petitioner submitted the sale document and also one confirmation dated 12.12.2003 between the buyer and the supplier and as per the first contract one P.T. Svee International, Jakarta, Indonesia was the "foreign buyer" and the petitioner was required to sell the said wheat for wheat products to it. It is also further submitted that on the basis of the aforesaid confirmation

dated 12.12.2003 the petitioner requested for release of 1523 MTs. wheat for export of 990 MTs. of wheat flour on 15.12.2003. It is further submitted that as per the policy and the contract the petitioner was required to furnish the Bank guarantee which the petitioner furnished for an amount of Rs. 22,31,195 towards Post Delivery expenses and inland transport expenses. It is further submitted that as per the policy and the contract the petitioner was required to submit necessary export documents to the Corporation within a period of 90 days which the petitioner did not produce. It is further submitted that on the basis of the request made by the petitioner to extend the time to furnish requisite export documents the same was considered considering the request letter dated 25.2.2004 and time to submit export documents was extended. It is submitted that by no stretch of imagination the extension of time to submit export documents can be considered to be allowing the petitioner to change the "foreign buyer". It is further submitted that in fact on the basis of the letter dated 3.2.2004 the Deputy Manager (Commercial) informed the District Manager, FCI, Rajkot, vide communication dated 11.2.2004 to ensure obtaining of all the export documents as per Headquarters instruction circulated to all concerned for strict compliance and the District Manager, FCI, Rajkot was directed report compliance. It is further submitted that by communication dated 24th February 2004 the District Manager, FCI, Rajkot has already informed the Senior Regional Manager, FCI, Ahmedabad to the effect that they have gone through all the records, circulars, instructions related to change of foreign buyer contract and it is noticed that no change of "foreign buyer" is allowed for export of wheat products. Thus, it is submitted that as far back as in the month of February 2004 itself the prayer of the petitioner for change of "foreign buyer" came to be turned down. It is further submitted that in subsequent extension nowhere it is stated that it is due to the change of buyer the extension is granted. It is submitted that as it was represented by the petitioner that there was shortage of emptry containers from the shipping lines due to heavy congestion for which shipment was being delayed, as a special case the time was extended to submit the export documents. It is also further submitted that by communication dated 16.4.2004 the petitioner has nowhere mentioned that the wheat for wheat products has been exported to which buyer. It is submitted that as the petitioner has not exported the wheat for wheat product to the "foreign buyer" mentioned in the original contract and the application of the petitioner for change of buyer has not been accepted and

the petitioner has not furnished requisite export documents, the respondents are well within their rights to encash their Bank guarantee as per the contract, policy and guidlines and therefore it was requested to dismiss the present Special Civil Application. It is also further submitted that so far as permission granted to one M/s. Bishan Swaroop Ramkishan Agro Pvt. Ltd.,Delhi with regard to change of "foreign buyer" is concerned, the same was granted as a special case as the wheat for wheat products was to be exported to the country for United Nations World Programme. It is submitted that in fact in the case of One M/s. Moon Agro in whose case it was found that the wheat for wheat products has been exported to another foreign buyer other than the original contract, the Corporation had encashed the Bank guarantee. It is also further submitted that export of wheat products involves high profit making and therefore no change of buyer is permissible. It is also further submitted that besides, if at the time of submission of contract one name of foreign buyer is given and later if one is permitted to change the buyer only because other buyer makes profit, then it lowers the image of India as a country. It is also further submitted that intention of changing the buyer is in order to make profit while taking wheat from respondent Corporation at subsidised rate. It is submitted that as per the original-contract submitted on 15.12.2003 the petitioner was to sell wheat product at 205 US$ per MT, however by subsequent contract and by change of foreign buyer and by export of wheat products to various parties the average rate is arrived at 256.20 US$ per MT. Thus it is requested to dismiss the present Special Civil Application with costs.

7. Shri Malkan, learned Central Government STanding Counsel, while adopting the submissions made on behalf of FCI has in addition submitted that the policy of not allowing change of foreign buyer contract so far as wheat product is concerned, it is the policy of the Government of India. It is submitted that the change of "foreign buyer" is not permitted so far wheat for wheat product is concerned which is established from the representation of Roller Flour Millers Federation of India. He has submitted that if the change of foreign buyer is permissible, then there would not have been any representation for allowing to change in buyer's name. Therefore, he has submitted to dismiss the present Special Civil Application.

8. Heard the learned advocates appearing on behalf of the parties. It is an admitted position that vide

communication dated 15.12.2003 the petitioner requested for release of 1523 MTs of wheat for export of 990 MTs wheat flour. It is also an admitted position that along with the said request the petitioner has produced one contract/confirmation dated 12.12.2003 by which the petitioner was required to export the aforesaid wheat flour to one M/s. P.T. Svee International Apt Metro Sunter Unit, Jakarta, Indonesia. Thus, the said P.T. Svee International, Indonesia was the "foreign buyer" and the petitioner was the supplier. It is also an admitted position that the price fixed was 205 US$ per M.T. It is the policy of the Government of India and the FCI not to allow for the change of "foreign buyer", as change of "foreign buyer" so far as wheat for wheat products is concerned is not permissible. It is also an admitted position that as per the contract and the policy and guidelines, the petitioner was required to furnish Bank guarantee and the petitioner was required to submit the requisite export documents within a period of 90 days. As per the policy and the guidelines if the petitioner does not produce the requisite export documents within 90 days then the FCI is at liberty to encash the Bank guarantee. It is the case of the petitioner that as "foreign buyer", i.e. P.T. Svee International did not send advance payment before 5th January 2004 and they didi not send any advance payment till 3.2.2004 it was decided not to supply wheat flour to the said P.T. Svee International under the original foreign buyer contract but it was decided to export the wheat flour to one Agri Commodities and Finance FZE, UAE and accordingly the petitioner informed the Senior Regional Manager, FCI, Ahmedabad, vide communicated dated 3.2.2004. Along with the said communication dated 3.2.2004 informing the Senior Regional Manager, FCI, Ahmedabad, the petitioner had also produced one sale/purchase contract between the petitioner and the said Agri Commodities and Finance, FZE. It is required to be noted that as per the petitioner as the first "foreign buyer", i.e. P.T. Svee International did not send advance payment before 5th January 2004 and they did not send advance payment till 3.2.2004 it was decided not to export wheat flour to them and it was decided to export the wheat flour to the said AGri Commodities & Finance, FZE, UAE. It is required to be noted that the sale/purchase contract which is entered into between the petitioner and the said Agri Commodities & Finance, FZE, is dated 29.12.2003. Thus, the reasoning given by the petitioner that non-sending of advance payment by the first "foreign buyer", i.e. P.T. Svee International on or before 5th January and till 3rd February 2004 necessitated the petitioner to change the foreign buyer contract cannot be accepted in view of the

fact that prior thereto, i.e., on 29.12.2003 itself the petitioner had already entered into contract for export of wheat flour with the said Agri Commodities & Finance, FZE, UAE. Thus, the petitioner had already decided to change the "foreign buyer" and hence the reasoning given by the petitioner for change of buyer, namely non-sending of advance payment on or before 5th January and till 3rd February 2004 by the said 1st foreign buyer, cannot be accepted. From the above facts, it is clear, that first it was decided by the petitioner to change the "foreign buyer" and a contract came to be entered into on 29.12.2003 and thereafter for the first time informing the Senior Regional Manager, Ahmedabad on 3rd February 2004 with regard to change of "foreign buyer". This shows the malafide intention on the part of the petitioner. Hence, the reasoning given by the petitioner for change of foreign buyer being not bonafide cannot be accepted.

9. It is the case of the petitioner that the petitioner informed the Senior Regional Manager, FCI, Ahmedabad on 3.2.2004 informing that the petitioner had changed the foreign buyer and that by communication dated 25.2.2004 the petitioner requested for extension of time to complete export in view of change in foreign buyer and the foreign buyer contract, and that due to some delay in export of wheat product in view of acute shortage of empty containers to be obtained from shipping lines due to heavy congestion and on extension of time the respondents have accepted the request of the petitioner for change of foreign buyer. Now, on going through the communication dated 25.2.2004 by which the petitioner requested for extension of time, I find that there is no mention in that communication about request of extending time for submitting the export documents due to change of foreign buyer. In the communication dated 25.2.2004, it is only stated that there is acute shortage of empty containers to be obtained from the shipping lines due to heavy congestion. Even in the communication dated 23rd March 2004 by which the request of the petitioner for extension of time to submit the export documents came to be extended, nowhere it is found accepting the request of the petitioner for change of "foreign buyer". Even on the basis of the communication dated 3.2.2004 informing the respondent No.3 to the effect that the petitioner has decided to export to Agro Commodities & Finance, it is neither here nor there and by itself it cannot be said that the petitioner is permitted to change the foreign buyer. It is also required to be noted that in the communication dated 3.2.2004 the petitioner has used the words "Wheat rather than wheat for wheat product and/or

wheat flour". Now, from the documentary evidences which are on record along with the affidavit-in-reply in fact the request of the petitioner for change of foreign buyer has already been rejected as far back as on 23rd February 2004 as no change of foreign buyer contract is allowed for export of wheat product. Thus, after the communication dated 23rd February 2004 there was no reason for any of the respondents to allow change of foreign buyer contract and as such nothing is on record to show that the request of the petitioner for change of foreign buyer contract has been accepted by any of the authorities. Considering the aforesaid facts and considering the fact that the petitioner has not exported the wheat for wheat products to the "foreign buyer" as per the original first contract, i.e. to M/s. P.T. Svee International, Indonesia, and instead has sold and exported to various countries at a higher price, which is not permissible under the policy of the Government of India and the FCI and considering the fact that the petitioner has not produced the necessary requisite export documents with the respondent FCI within the stipulated time and inspite of non-grant of permission to the petitioner to change the foreign buyer contract the petitioner committed the breach, by exporting the wheat for wheat products to various other foreign buyers and other foreign countries and in that event if the respondents have insisted for encashment of Bank guarantee as per the policy, guidelines and contract, it cannot be said that there is any illegality committed by any of the respondents. So far as the reliance placed by the petitioner upon the communication dated 19.9.2003 in the case of one M/s. Bishen Swaroop Ramkishan (P) Ltd., Delhi, is concerned, as a special case in that peculiar facts and circumstances, permission was granted as the wheat was to be exported for United Nations World Programme. Thus, it cannot be said to be the policy of the Government of India in all the cases of export of wheat products. As submitted by the respondents in their affidavit-in-reply, in fact in the case of one M/s. Moon Agro who had exported wheat for wheat products to another buyer, i.e., other than the original-buyer the Bank guarantee had been encashed by the FCI and therefore it cannot be said that there is any discriminatory treatment given to the petitioner.

9.1. It appears that the intention of the petitioner was to get profit by selling the wheat for wheat products to other foreign buyers at a higher price and the reasoning given by the petitioner for change of buyer, i.e., non-payment of advance amount on or before 5th January 2004 and 3rd February 2004 cannot be accepted for

the simple reason that even without waiting upto 5th January 2004 and/or 3rd February 2004 the petitioner had already entered into the contract with the new foreign buyer on 29.12.2003 itself. As submitted in the affidavit-in-reply the petitioner has sold the wheat for wheat products to other foreign buyers at a higher price and has earned huge profit by getting the wheat for wheat products from the FCI at a subsidised price. This shows the malafide intention on the part of the petitioner which disentitles the petitioner any discretionary relief in a petition under Article 226 of the Constitution of India.

10. In fact, for the reasons stated hereinabove, the petitioner has not come out with clean hands and the reasoning given by the petitioner for change of buyer does not inspire any confidence. Thus, considering the aforesaid facts and circumstances of the case when it is found that the petitioner has exported the wheat for wheat products to other foreign buyers other than the "foreign buyer" as per the original first contract without the permission for change of buyer, and having rejected the request of the petitioner for change of foreign buyer and having found that the petitioner has not submitted the requisite export documents within the stipulated time and has also not submitted the requisite export documents, when the respondents are trying to encash the Bank guarantee as per the policy guidelines and contract, it cannot be said that there is any illegality committed by any of the respondents which requires interference of this Court in a petition under Article 226 of the Constitution of India. On the contrary, the respondents are justified in invoking the Bank Guarantee and insisting for encashing the Bank guarantee.

11. For the reasons stated above, there is no substance in the Special Civil Application and the same requires to be dismissed and is hereby dismissed. Notice is discharged. Ad-interim relief granted earlier stands vacated forthwith. However, at this stage, Shri Pahwa, learned advocate appearing on behalf of the petitioner has requested to continue the ad-interim relief granted earlier. In the facts and circumstances of the case, the ad-interim relief granted earlier on 27.10.2004 is extended upto 17th January 2005 on condition that the petitioner to extend the Bank guarantee on the same terms and conditions as per the earlier Bank Guarantee.

12. In view of the dismissal of the Special Civil

Application, no orders as on the Civil Application No. 9953 of 2004.

[M.R. Shah, J.]

rmr.